

1 DAVID R. ZARO (BAR NO. 124334)  
2 JOSHUA A. DEL CASTILLO (BAR NO. 239015)  
3 NORMAN M. ASPIS (BAR NO. 313466)  
4 ALLEN MATKINS LECK GAMBLE  
5 MALLORY & NATSIS LLP  
6 865 South Figueroa Street, Suite 2800  
7 Los Angeles, California 90017-2543  
8 Phone: (213) 622-5555  
9 Fax: (213) 620-8816  
10 E-Mail: dzaro@allenmatkins.com  
11 jdelcastillo@allenmatkins.com  
12 naspis@allenmatkins.com

13 Attorneys for Receiver  
14 THOMAS SEAMAN

15 UNITED STATES DISTRICT COURT  
16 SOUTHERN DISTRICT OF CALIFORNIA

17 SECURITIES AND EXCHANGE  
18 COMMISSION,

19 Plaintiff,

20 v.

21 TOTAL WEALTH MANAGEMENT,  
22 INC.; et al.,

23 Defendants.

Case No. 15-cv-226 BAS-MSB

NO ORAL ARGUMENT UNLESS  
REQUESTED BY THE COURT

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION OF RECEIVER, THOMAS A.  
SEAMAN, FOR ORDER:  
(1) APPROVING FINAL REPORT AND  
ACCOUNTING; (2) AUTHORIZING  
PAYMENT OF FINAL FEE  
APPLICATIONS OF RECEIVER AND  
PROFESSIONALS; AND (3) STAYING  
RECEIVERSHIP CASE AND  
DISCHARGING AND RELEASING  
RECEIVER

[Notice of Motion and Motion;  
Declaration of Thomas A. Seaman; Final  
Report and Accounting; Final  
Applications for Payment of Fees and  
Reimbursement of Expenses; and  
[Proposed] Order thereon submitted  
concurrently herewith]

Date: March 2, 2020  
Ctrlm: 4B  
Judge Hon. Cynthia Bashant

## TABLE OF CONTENTS

		<u>Page</u>
1		
2		
3	I. INTRODUCTION .....	5
4	II. PRELIMINARY STATEMENT .....	6
5	III. RELEVANT PROCEDURAL BACKGROUND .....	8
6	IV. RECEIVERSHIP WIND-UP RECOMMENDATIONS .....	10
7	A. Approval of the Receiver's Final Report.....	10
8	B. Payment of Fees and Expenses of Receiver and His Professionals .....	10
9	C. PPCN Settlement.....	11
10	D. Undertake Receivership Wind-Up And Closing Tasks .....	12
11	1. Submission of Appropriate Tax Returns and Other Filings .....	12
12	2. Abandonment or Destruction of Records .....	12
13	3. Remittance of Receivership Assets .....	13
14	4. Discharge and Release of the Receiver .....	13
15	V. ARGUMENT .....	14
16	A. The Proposed Final Closing Tasks Should Be Authorized .....	14
17	B. The Final Fee Applications Are Reasonable And Appropriate, And Payment Of All Outstanding Fees and Expenses Should Be Authorized At This Time .....	16
18	1. The Fees and Expenses Requested in the Final Fee Applications are Reasonable .....	16
19	2. The Fees and Expenses Requested in the Final Fee Applications have been Submitted to the Commission, Without Objection .....	17
20	3. The Receiver Should be Authorized to Pay Allowed Fees and Expenses from Cash on Hand.....	18
21	VI. CONCLUSION .....	19
22		
23		
24		
25		
26		
27		
28		

**TABLE OF AUTHORITIES****Page(s)****Cases**

<u>Bennett v. Williams,</u> 892 F.2d 822 (9th Cir. 1989).....	15
<u>CFTC v. Topworth Int'l,</u> 205 F.3d 1107 (9th Cir. 1999).....	14
<u>Finn v. Childs Co.,</u> 181 F.2d 431 (2d Cir. 1950).....	17, 18
<u>Fleet Nat'l Bank v. H&amp;D Entm't,</u> 926 F. Supp. 226 n. 56 (D. Mass. 1996) .....	14
<u>Gaskill v. Gordon,</u> 27 F.3d 248 (7th Cir. 1994).....	16
<u>In re Phila. &amp; Reading Coal &amp; Iron Co.,</u> 61 F. Supp. 120 (D.C. Pa. 1945) .....	17, 18
<u>In re Thinking Machs. Corp.,</u> 182 B.R. 365 (D. Mass. 1995).....	15
<u>In re Thinking Machs. Corp.,</u> 67 F.3d 1021 (1st Cir. 1995) .....	15
<u>SEC v. Am. Capital Invs.,</u> 98 F.3d 1133 (9th Cir. 1996).....	14
<u>SEC v. Basic Energy &amp; Affiliated Res.,</u> 273 F.3d 657 (6th Cir. 2001).....	14
<u>SEC v. Elliot,</u> 953 F.2d 1560 (11th Cir. 1992).....	16
<u>SEC v. Elliot,</u> 998 F.2d 922 (11th Cir. 1993).....	16
<u>SEC v. Fifth Ave. Coach Lines, Inc.,</u> 364 F.Supp. 1220 (S.D.N.Y. 1973).....	16, 18
<u>SEC v. Forex Asset Mgmt., LLC,</u> 242 F.3d 325 (5th Cir. 2001).....	14
<u>SEC v. Hardy,</u> 803 F.2d 1034 (9th Cir. 1986).....	14
<u>SEC v. Health Maint. Ctrs., Inc.,</u> 2002 WL 34388014 (W.D. Wash. 2002) .....	15
<u>SEC v. Wang,</u> 944 F.2d 80 (2d Cir. 1991).....	14

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Page(s)**

Sw. Media, Inc. v. Rau,  
708 F.2d 419 (9th Cir. 1983)..... 15

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION.**

Thomas A. Seaman (the "Receiver"), the Court-appointed permanent receiver for Total Wealth Management, Inc. ("Total Wealth") and its subsidiaries and affiliates including, but not limited to, Altus Capital Management, LLC (collectively, the "Receivership Entities" or "Entities"), hereby submits the present motion for an order: (1) Approving Final Report and Accounting; (2) Authorizing Payment of Final Fee Applications of Receiver and Professionals; and (3) Staying Receivership Case and Discharging and Releasing Receiver (the "Wind-Up Motion"). As of the date of the instant Wind-Up Motion, the Receiver believes he has – with the assistance of his Professionals<sup>1</sup> – fulfilled each of his responsibilities to the fullest extent possible, and has exhausted all reasonable efforts to recover additional receivership assets ("Receivership Assets" or "Assets") for the benefit of the estate of the Receivership Entities (the "Estate"). The specific accomplishments of the Receiver and his Professionals are summarized herein, and in the Receiver's Final Report and Accounting ("Final Report"), submitted concurrently with the instant Wind-Up Motion.

Accordingly, the Receiver recommends that the Court now authorize him to commence the termination of the instant receivership, including the enumerated wind-up tasks identified below. As the Receiver performs these wind-up tasks, he respectfully requests that the Court stay the above-captioned receivership, and retain jurisdiction over the instant receivership, solely for the limited purpose of permitting the Receiver to make a supplemental and final distribution on a *pro rata* basis to all allowed, non-subordinated claims, from any available funds paid in connection with the settlement of the action styled Seaman v. Private Placement Capital Notes II,

---

<sup>1</sup> For the purposes of this Wind-Up Motion, the Receiver's "Professionals" are his attorneys, Allen Matkins Leck Gamble Mallory & Natsis, LLP, and his accountants and tax professionals, Crowe LLP.

1 LLC, et al., USDC, S.D. Cal. Case No. 16-cv-0578 BEN (DHB) (the "PPCN  
2 Action"), as detailed herein (the "Final Distribution").

3 Following any Final Distribution or, if the Receiver determines that no Final  
4 Distribution will be made, then the Receiver will file a declaration ("Final  
5 Declaration") with the Court notifying the Court that the Receiver has completed all  
6 of his work, and the receivership should be closed. Absent any further inquiry by  
7 the Court, the Receiver shall be discharged upon the filing of the Final Declaration.

## 8 **II. PRELIMINARY STATEMENT.**

9 Pursuant to this Court's February 12, 2015 "(1) Preliminary Injunction,  
10 Appointment of a Permanent Receiver, and Related Orders; and (2) Order Vacating  
11 Hearing on Preliminary Injunction" (the "Appointment Order") (ECF No. 8), and  
12 this Court's May 8, 2015 "Order Granting Motion for Order in Aid of Receivership"  
13 (ECF No. 31), the Receiver's most significant accomplishments during the pendency  
14 of the instant receivership include:

- 15 • Completing a detailed review and analysis of the business and financial  
16 activities of the Receivership Entities, including a review and analysis of  
17 hundreds of thousands of transactions, detailed in over a million pages of  
18 records relating to the Receivership Entities and their investors;
- 19 • Marshaling and preserving all Receivership Assets, ultimately resulting  
20 in gross recoveries in the amount of \$4,989,420 for the benefit of the  
21 Receivership Entities, including funds raised from the sale of personal  
22 property assets, liquidations, and settlement and pending litigation;
- 23 • Securing Court approval of the settlement of claims alleged in the  
24 action styled Seaman v. Lively, et al., Case No. 37-2016-00003644-CU-PN-  
25 CTL, and recovering significant settlement proceeds for the benefit of the  
26 Receivership Entities, including with respect to settlement proceeds against  
27 which Defendant Jacob Cooper alleged a claim;

28

- 1 • Negotiating a settlement, and securing Court approval thereof, of the
- 2 PPCN Action (the "PPCN Settlement"), which provides for, among other
- 3 things, a settlement payment to the Receivership Entities in the amount of at
- 4 least \$1 million, and which, if successful, may enable the Receiver to make
- 5 the Final Distribution on allowed claims;
- 6 • Reviewing and addressing more than three hundred (300) claims
- 7 submitted by Receivership Entity investors and creditors, conferring with
- 8 claimants regarding claim deficiencies, and developing and securing Court
- 9 approval of his recommended equitable treatment of allowed claims; and
- 10 • Developing, and securing Court approval of, the proposed omnibus
- 11 plan for distribution on allowed claims, pursuant to which the Receiver made
- 12 an initial distribution, in the aggregate amount of \$2,831,772.34<sup>2</sup>, on a *pro*
- 13 *rata* basis on all allowed, non-subordinated claims. (See concurrently filed
- 14 Declaration of Thomas A. Seaman ["Seaman Decl."] ¶ 3.)

15 The Receiver further administered and protected the Estate, including

16 conferring with investors to keep them apprised of the status of his receivership and

17 claims administration efforts, and monitoring and participating in, as necessary,

18 pending third-party litigation which related to or implicated the Receivership

19 Entities.

---

22 <sup>2</sup> In connection with the Receiver's "Motion for Order Authorizing and Approving

23 Omnibus Plan for Distribution on Allowed Claims" (ECF No. 245), the Court

24 entered its April 8, 2019 "Order: (1) Overruling Claimant Richard M.

25 Kipperman's Objection and (2) Granting Receiver Thomas A. Seaman's Motion

26 for Order Authorizing and Approving Omnibus Plan for Distribution on Allowed

27 Claims, as Amended" (the "Omnibus Distribution Order") (ECF No. 253),

28 pursuant to which the Court authorized the Receiver to make an initial aggregate

distribution in the amount of \$2,832,982, on a *pro rata* basis, on all allowed,

non-subordinated claims. Subsequently, the Receiver corrected an erroneously-

calculated distribution to a particular investor, which led to an additional

distribution in the amount of \$1,178.28. In addition, the Receiver made an

adjustment to the aggregate distribution amount to the extent that certain

distribution checks were voided, in the amount of \$2,387.98. Accordingly, the

Receiver's initial distribution amount was \$2,831,772.34.

1 **III. RELEVANT PROCEDURAL BACKGROUND.**

2 The Receiver invites the Court and interested parties to review the materials  
3 identified in **Appendix 1** to the Final Report for a general summary of the relevant  
4 facts underlying the above-captioned receivership case and the activities and efforts  
5 of the Receiver and his Professionals. A full recitation of the procedural and factual  
6 history of the above-captioned action is unnecessary for the purposes of this Wind-  
7 Up Motion, particularly given that the Receiver's concurrently-submitted Final  
8 Report summarizes the Receiver's actions during the pendency of this matter. As to  
9 this Wind-Up Motion, the relevant facts are as follows:

10 The above-captioned enforcement action was commenced by the Plaintiff  
11 Securities and Exchange Commission (the "Commission") on February 4, 2015.  
12 (ECF No. 1.) The Commission's Complaint alleged that Defendants Total Wealth  
13 and its founder, Jacob Cooper, ran a series of unregistered hedge funds through  
14 which they took substantial funds from client accounts, under the guise of  
15 "administrative fees," without providing any meaningful explanation or accounting  
16 to clients. The Commission requested the appointment of a receiver and, on  
17 February 12, 2015, this Court entered the Appointment Order. (ECF No. 8.)

18 Since his appointment, the Receiver has administered the Estate and all  
19 Receivership Assets in accordance with the Court's instructions including, but not  
20 limited to: (1) marshaling and preserving Receivership Assets; (2) performing  
21 accountings and analysis of the Receivership Entities' financial activities and  
22 condition; (3) eliminating and addressing the Entities' liabilities; (4) recommending  
23 the claims process, appropriate treatment of claims, and making distributions; and  
24 (5) preparing reports for this Court. (See concurrently filed Declaration of Thomas  
25 A. Seaman ["Seaman Decl."] ¶ 2.) The specific actions undertaken to-date are  
26 identified in the Receiver's various interim and quarterly reports, including the Final  
27 Report. Importantly, the Receiver believes he has – with the assistance of his  
28 Professionals – fulfilled each of his responsibilities to the fullest extent possible, and



1 has exhausted all reasonable efforts to recover additional Receivership Assets for  
 2 the benefit of the Estate. Accordingly, the Receiver's continued administration,  
 3 except in connection with a potential settlement payment derived from the PPCN  
 4 Settlement, will not increase the amount of Assets available to the Receivership  
 5 Estate. (Seaman Decl. ¶ 4.) Thus, the costs of continuing the receivership now  
 6 outweigh the benefits. Id. Given this determination, and having fulfilled his  
 7 responsibilities under the Appointment Order, the Receiver believes it is now time  
 8 to stay the receivership case pending a potential performance of the PPCN  
 9 Settlement, as detailed below, and discharge and release the Receiver, except as in  
 10 connection with the Final Distribution. Id. at ¶ 5.

11 Most recently, the Receiver secured Court approval of the PPCN Settlement,  
 12 pursuant to the Order Approving Settlement, dated September 18, 2019 (ECF No.  
 13 258). As provided for under the terms of the PPCN Settlement, Private Placement  
 14 Capital Notes II, LLC and its associated entities (collectively, "PPCN") is obligated  
 15 to pay the Receiver \$1.0 million on or before September 18, 2020. This obligation  
 16 is secured by a stipulated judgment, which may be recorded in the event that a  
 17 payment is not timely made. If PPCN performs its obligations under the PPCN  
 18 Settlement and timely pays the Receiver, the Receiver will make the Final  
 19 Distribution, per the terms of the Omnibus Distribution Order. If, however, PPCN  
 20 fails to timely pay the Receiver, pursuant to the PPCN Settlement, the Receiver may  
 21 file and record the stipulated judgment<sup>3</sup>.

22 For the reasons set forth herein, the Receiver respectfully requests that this  
 23 Court enter an Order approving the Receiver's Final Report; authorizing the  
 24 payment of the Final Fee Applications; authorizing the Receiver to commence  
 25 termination of the instant receivership, including the enumerated wind-up tasks; and  
 26

27  
 28 <sup>3</sup> If PPCN fails to pay the amounts required under the PPCN Settlement, the  
 Receiver may retain or sell the stipulated judgement in his sole discretion, but is  
 under no obligation to pursue a collection therefrom.

1 staying the above-captioned action and retaining jurisdiction of the instant  
 2 receivership for the limited purpose of permitting the Receiver to make the Final  
 3 Distribution, if possible. The Receiver respectfully requests that the Court discharge  
 4 and release the Receiver upon the Receiver's filing of the Final Declaration  
 5 reflecting completion of the wind-up tasks and the outcome of the PPCN Settlement.  
 6 Id. at ¶ 6.

#### 7 **IV. RECEIVERSHIP WIND-UP RECOMMENDATIONS.**

8 The Receiver believes that he has now satisfied his obligations to the Estate  
 9 and exhausted all reasonable efforts to recover additional Receivership Assets.  
 10 Accordingly, the Receiver recommends that the Court now authorize him to  
 11 commence the termination of the instant receivership. Specifically, the Receiver's  
 12 recommendations are as follows:

##### 13 **A. Approval of the Receiver's Final Report.**

14 The Receiver's Final Report (which also appends his final accounting for the  
 15 Estate) has been submitted to the Court concurrently with this Wind-Up Motion.  
 16 (Seaman Decl. ¶ 5; see also, Receiver's Final Report filed concurrently herewith.)  
 17 The Final Report summarizes the actions of the Receiver and his Professionals  
 18 during the pendency of the receivership case, and provides descriptions of his  
 19 document review and analysis, accounting, Asset preservation and recovery, claims  
 20 administration, and reporting efforts. Id. A copy of the Receiver's final accounting  
 21 summary, reflecting recoveries and expenditures during the pendency of the  
 22 receivership, is attached as **Exhibit 1** to the Final Report. Id. The Receiver  
 23 respectfully requests that the Court approve his Final Report.

##### 24 **B. Payment of Fees and Expenses of Receiver and His Professionals.**

25 Concurrently with this Wind-Up Motion, the Receiver and his Professionals  
 26 have submitted their respective Final Fee Applications, requesting payment of their  
 27 respective outstanding fees and expenses already incurred and anticipated fees and  
 28 expenses through the termination of the instant receivership. (Seaman Decl. ¶ 5.)

1 The Court has already authorized the Receiver, pursuant to its April 8, 2019  
 2 Omnibus Distribution Order (ECF No. 253), to set aside \$520,334 from cash on-  
 3 hand to cover the Receiver's and his Professionals' administrative and professional  
 4 fees, including for: (a) unpaid holdbacks of \$333,834.41 of already-approved fees  
 5 and expenses; and (b) a proposed reserve in the aggregate amount of \$186,500 to  
 6 cover remaining administrative fees and expenses.<sup>4</sup> (Seaman Decl. ¶ 7.)

7 While the Court has authorized the set-aside of these amounts, it has not  
 8 authorized the Receiver to make a payment therefrom. Accordingly, the Receiver  
 9 respectfully requests such authorization at this time to pay his, and his  
 10 Professionals': (1) unpaid holdbacks in the aggregate amount of \$333,834.41; and  
 11 (2) outstanding administrative and professional fees and anticipated fees and  
 12 expenses through the termination of the instant receivership, from the set-aside  
 13 reserve amount of \$226,491.50. (Id.)

#### 14 **C. PPCN Settlement.**

15 If PPCN performs its obligations under the PPCN Settlement and timely pays  
 16 the Receiver, the Receiver will make the Final Distribution, per the terms of the  
 17 Omnibus Distribution Order. If, however, PPCN fails to timely pay the Receiver,  
 18 pursuant to the PPCN Settlement, the Receiver may file and record the stipulated  
 19 judgment.

20 In light of the contingent nature of PPCN's performance under the PPCN  
 21 Settlement, the Receiver respectfully requests that the Court stay the above-  
 22 captioned action, and retain jurisdiction over the instant receivership, for the limited  
 23

---

24 <sup>4</sup> The Receiver has recovered an additional \$42,655.50, such that he now has  
 25 \$562,989.50 in cash on-hand to cover the Receiver's and his Professionals'  
 26 administrative and professional fees. Given the scope and complexity of the  
 27 work that the Receiver and his Professionals performed from August 1, 2018 to  
 28 present, the Receiver respectfully requests that the reserve amount be increased  
 to \$226,491.50 (from \$186,500), so that a portion of the additional funds  
 recovered may be used to compensate the Receiver and his Professionals for  
 work performed from August 1, 2018 through the termination of the instant  
 receivership.

1 purpose of permitting the Receiver to make the Final Distribution of proceeds  
 2 recovered from the PPCN Settlement, if any, along with the filing of any associated  
 3 tax returns.

4 In accordance with the Omnibus Distribution Order, the Receiver will notify  
 5 the Court within seven (7) days after either completion of the Final Distribution. If  
 6 the Receiver determines that no Final Distribution will be forthcoming, the Receiver  
 7 will file the Final Declaration and request the Court to close the receivership.

8 **D. Undertake Receivership Wind-Up And Closing Tasks.**

9 The Receiver respectfully reiterates his request to undertake the  
 10 recommended wind-up and termination procedures, as set forth in detail in the  
 11 Eighth Interim Report and Petition for Further Instructions (the "Eighth Interim  
 12 Report") (ECF No. 246), which include:

13 1. Submission of Appropriate Tax Returns and Other Filings.

14 The Receiver is required to submit appropriate tax returns for each calendar  
 15 year of the pendency of the receivership. (Seaman Decl. ¶ 10.) Based on his  
 16 discussions with his accounting professionals, the Receiver will file the Qualified  
 17 Settlement Fund returns for the Entities for the 2019 tax year on or before February  
 18 20, 2020. (Id.) If there is a Final Distribution, the Receiver anticipates submitting  
 19 necessary and appropriate tax returns prior to, or contemporaneously with, the  
 20 closure of the receivership case, which shall be promptly after the Final Distribution  
 21 is completed or, in the event that such distribution is not possible, after notice to the  
 22 Court and a recommendation that the receivership be terminated. (Id.)

23 2. Abandonment or Destruction of Records.

24 The Receiver has obtained and reviewed hundreds of thousands of pages of  
 25 material relevant to the business and financial activities of the Receivership Entities,  
 26 in hard copy and digital form. (Seaman Decl. ¶ 11.) Some of these documents  
 27 contain private financial information. The Receiver therefore requests that, within  
 28 ninety (90) days after the entry of an order approving the Receiver's

1 recommendations herein, the Receiver be authorized to abandon any documents  
 2 containing non-private information, and destroy any documents containing private  
 3 information, except for those records, if any, that are necessary to the Final  
 4 Distribution. (Id.)

### 5 3. Remittance of Receivership Assets.

6 As noted above, in order to calculate his recommended initial distribution  
 7 amount, the Receiver previously proposed, in his Eighth Interim Report, setting  
 8 aside a total of \$520,334, reflecting the unpaid holdbacks of approved fees via  
 9 earlier applications, plus a reasonable estimate of the aggregate administrative fees  
 10 and expenses the Receiver and his Professionals expect to incur in administering the  
 11 Estate from the date of the last Court-approved fee applications through the  
 12 termination of the receivership and the discharge and release of the Receiver.<sup>5</sup> The  
 13 Receiver recommends that the Court authorize him to remit any unused or unapplied  
 14 funds remaining in this reserve at the time of the termination of the receivership to  
 15 the Commission. (Seaman Decl. ¶ 12.)

### 16 4. Discharge and Release of the Receiver.

17 The only task remaining in the instant receivership is the prospective Final  
 18 Distribution pursuant to the PPCN Settlement (and possibly an additional tax  
 19 return), in accordance with this Court's Omnibus Distribution Order. Accordingly,  
 20 the Receiver believes that it is appropriate to present his Final Report, along with the  
 21 Final Fee Applications, and to request the Court to stay the receivership case and  
 22 retain jurisdiction thereover, pending a potential performance of the PPCN  
 23 Settlement. To facilitate the goals of the instant receivership, the Receiver requests  
 24 that the Court retain jurisdiction over any settlement proceeds paid in connection  
 25

---

26 <sup>5</sup> See Footnote 4, reflecting the current cash on-hand balance of \$562,989.50,  
 27 which includes additional recoveries of \$42,655.50. The Receiver respectfully  
 28 requests that the reserve to cover administrative and professional fees from  
 August 1, 2018 through the termination of the instant receivership be increased  
 to \$226,491.50.

1 with the PPCN Settlement, which settlement proceeds shall remain subject to the  
2 self-help bar and litigation stay imposed by the Appointment Order.

3 It may be some time before PPCN makes a payment to the Receiver in  
4 accordance with the PPCN Settlement. Likewise, it is uncertain whether PPCN will  
5 make all contemplated payments. Accordingly, and in order to best preserve limited  
6 receivership resources and further limit the cost of administering the Estate, the  
7 Receiver recommends that the Court accept the Receiver's Final Report and  
8 eliminate further reporting obligations in connection with the instant receivership  
9 such that the Receiver shall only be required to submit a written update only if the  
10 Receiver believes the Court's attention is needed to facilitate the payment of the  
11 Final Distribution. (Seaman Decl. ¶ 13.)

## 12 **V. ARGUMENT.**

### 13 **A. The Proposed Final Closing Tasks Should Be Authorized.**

14 A court's power to administer an equity receivership is extremely broad. SEC  
15 v. Hardy, 803 F.2d 1034, 1037 (9th Cir. 1986); SEC v. Forex Asset Mgmt., LLC,  
16 242 F.3d 325, 331 (5th Cir. 2001); SEC v. Basic Energy & Affiliated Res., 273 F.3d  
17 657, 668 (6th Cir. 2001); SEC v. Elliot, 953 F.2d 1560, 1566 (11th Cir. 1992); SEC  
18 v. Wang, 944 F.2d 80, 85 (2d Cir. 1991). In the absence of controlling authority,  
19 and where applicable, district courts supervising equity receiverships routinely look  
20 to bankruptcy law for guidance. SEC v. Am. Capital Invs., 98 F.3d 1133, 1140 (9th  
21 Cir. 1996); CFTC v. Topworth Int'l, 205 F.3d 1107, 1116 (9th Cir. 1999) (Central  
22 District local rules, for instance, "direct receivers, unless otherwise ordered ... to  
23 'administer the estate as nearly as possible in accordance with ... the administration  
24 of estates in bankruptcy.'"); Fleet Nat'l Bank v. H&D Entm't, 926 F. Supp. 226, 240  
25 n. 56 (D. Mass. 1996) ("[W]hat is permitted under the Bankruptcy Code, generally  
26 is, a fortiori, permissible under receivership law.").

27 In the case administration context, courts are deferential to the business  
28 judgment of bankruptcy trustees, receivers, and similar estate custodians. See, e.g.,



1 Bennett v. Williams, 892 F.2d 822, 824 (9th Cir. 1989) ("[W]e are deferential to the  
 2 business management decisions of a bankruptcy trustee."); Sw. Media, Inc. v. Rau,  
 3 708 F.2d 419, 425 (9th Cir. 1983) ("The decision concerning the form of ... [estate  
 4 administration] ... rested with the business judgment of the trustee."); see also SEC  
 5 v. Health Maint. Ctrs., Inc., 2002 WL 34388014 (W.D. Wash. 2002) (Equating  
 6 bankruptcy trustees with receivers and finding that "the courts have overwhelmingly  
 7 applied a 'business judgment' test" to estate administration.); In re Thinking Machs.  
 8 Corp., 182 B.R. 365, 368 (D. Mass. 1995) ("The application of the business  
 9 judgment rule ... and the high degree of deference usually afforded purely economic  
 10 decisions of trustees, makes court refusal unlikely.") (rev'd on other grounds, 67  
 11 F.3d 1021 (1st Cir. 1995)).

12 As reported herein and in the concurrently-submitted Final Report, the  
 13 Receiver has made all reasonable and necessary efforts to: recover, review, and  
 14 analyze Receivership Entity business records and documents; assemble forensic  
 15 accounting reports reflecting the Receivership Entities' financial activities; recover  
 16 available Receivership Assets; and develop and administer an equitable claims and  
 17 distribution process for victimized investors and creditors. The Receiver has  
 18 concluded, in his reasonable business judgment, that continued administration of the  
 19 instant receivership, except in connection with the potential Final Distribution from  
 20 the PPCN Settlement, will not result in recovery of any additional Receivership  
 21 Assets. Accordingly, the Receiver has concluded that it is now appropriate for the  
 22 Court to stay the receivership case and retain jurisdiction thereover pending a  
 23 potential performance of the PPCN Settlement. Consistent with the foregoing, the  
 24 Receiver requests that the Court order the discharge of the Receiver upon the  
 25 Receiver's filing of the Final Declaration reflecting the recovery and distribution of  
 26 proceeds from the PPCN Settlement, if any, or the disposition of any judgment  
 27 entered as a result of PPCN's failure to perform under the Settlement Agreement.

28

**B. The Final Fee Applications Are Reasonable And Appropriate, And Payment Of All Outstanding Fees and Expenses Should Be Authorized At This Time.**

As noted above, the Court entered its Omnibus Distribution Order on April 8, 2019 (see ECF No. 253), which authorized the Receiver to set aside \$520,334 from cash on-hand to cover the Receiver's and his Professionals' administrative and professional fees, including for: (a) unpaid holdbacks of \$333,834.41 of already-approved fees and expenses; and (b) a proposed reserve in the aggregate amount of \$186,500 to cover remaining administrative fees and expenses.<sup>6</sup>

"As a general rule, the expenses and fees of a receivership are a charge upon the property administered." Gaskill v. Gordon, 27 F.3d 248, 251 (7th Cir. 1994). These expenses include the fees and expenses of the Receiver and his Professionals. Decisions regarding the timing and amount of an award of fees and expenses to the Receiver and his Professionals are committed to the sound discretion of the Court. SEC v. Elliot, 953 F.2d 1560, 1577 (11th Cir. 1992) (rev'd in part on other grounds, 998 F.2d 922 (11th Cir. 1993)).

**1. The Fees and Expenses Requested in the Final Fee Applications are Reasonable.**

In determining the reasonableness of fees and expenses requested in this context, the Court should consider the time records presented, the quality of the work performed, the complexity of the problems faced, and the benefit of the services rendered to the receivership estate. SEC v. Fifth Ave. Coach Lines, Inc., 364 F.Supp. 1220, 1222 (S.D.N.Y. 1973).

---

<sup>6</sup> See Footnote 4, reflecting the current cash on-hand balance of \$562,989.50, which includes additional recoveries of \$42,655.50. The Receiver respectfully requests that the reserve to cover administrative and professional fees from August 1, 2018 through the termination of the instant receivership be increased to \$226,491.50 from \$186,500.



1 Here, the Final Fee Applications describe the nature of the services that have  
 2 been rendered, and where appropriate, the identity and billing rate of the individuals  
 3 performing each task. The Receiver and his Professionals have endeavored to staff  
 4 matters as efficiently as possible in light of the level of experience required and the  
 5 complexity of the issues presented. In general, the Final Fee Applications reflect the  
 6 Receiver's and his Professionals' customary billing rates and the rates charged for  
 7 comparable services in other matters, less any discounts or reductions specifically  
 8 identified in the respective applications. The weighted-average billing rates of the  
 9 Receiver and his Professionals are as noted in the Final Fee Applications.

10 The Receiver has reviewed the Final Fee Applications, and believes the  
 11 hourly rates charged were appropriate, given the requirements of the instant  
 12 receivership, that every effort was made to have tasks completed at the lowest  
 13 possible billing rate, and that the total fees for which the Receiver seeks  
 14 authorization for payment are fair and reasonable. (Seaman Decl. ¶ 8.) The  
 15 Receiver likewise believes that the Estate has benefited from the services identified.  
 16 (Id.)

17 2. The Fees and Expenses Requested in the Final Fee Applications  
 18 have been Submitted to the Commission, Without Objection.

19 Courts often consider the judgment and experience of the Commission  
 20 relating to receiver compensation. "[I]t is proper to [keep] in mind that the  
 21 [Commission] is about the only wholly disinterested party in [this] proceeding and  
 22 that ... its experience has made it thoroughly familiar with the general attitude of the  
 23 Courts and the amounts of allowances made in scores of comparable proceedings."  
 24 In re Phila. & Reading Coal & Iron Co., 61 F. Supp. 120, 124 (D.C. Pa. 1945).  
 25 Indeed, the Commission's perspectives are not "mere casual conjectures, but are  
 26 recommendations based on closer study than a district judge could ordinarily give to  
 27 such matters." Finn v. Childs Co., 181 F.2d 431, 438 (2d Cir. 1950) (internal  
 28 quotation marks omitted). In fact, "recommendations as to fees of the

1 [Commission] may be the only solution to the 'very undesirable subjectivity with  
 2 variations according to the particular judge under particular circumstances' which  
 3 has made the fixing of fees seem often to be 'upon nothing more than an ipse dixit  
 4 basis.'" Id. Thus, the Commission's perspective on the matter should certainly be  
 5 given "great weight," as observed by the court in Fifth Ave. Coach Lines, Inc., 364  
 6 F. Supp. at 1222.

7 In order to ensure that the fees and expenses requested in the Final Fee  
 8 Applications are appropriate, the Receiver and his Professionals have submitted  
 9 their respective invoices to the Commission for review. The Commission has not  
 10 objected. The Commission's satisfaction with the subject invoices therefore merits  
 11 significant deference. As the Phila. & Reading Coal & Iron Co. court observed, the  
 12 Commission is "thoroughly familiar with ... the amounts of allowances made in  
 13 scores of comparable proceedings." 61 F.Supp. at 124. Indeed, the Commission is  
 14 likely in the best position to measure the fees and expenses requested here against  
 15 those incurred in other, similar proceedings, and cases of similar complexity. The  
 16 Receiver and his Professionals thus respectfully request that the Court approve all  
 17 requested fees and expenses reflected in their respective Final Fee Applications,  
 18 which will be paid from the reserve identified in the Omnibus Distribution Order.

19 3. The Receiver Should be Authorized to Pay Allowed Fees and  
 20 Expenses from Cash on Hand.

21 The bulk of the funds the Receiver holds are those previously set aside per  
 22 Court Order to cover the fees and expenses incurred by the Receiver and his  
 23 Professionals. By their Final Fee Applications, the Receiver and his Professionals  
 24 respectfully request that the Court exercise its broad discretion and enter an Order  
 25 permitting the payment of fees and expenses requested from these funds.

26  
 27  
 28

1 **VI. CONCLUSION.**

2 Based on the Receiver's cumulative findings and the fulfillment of his duties  
3 under the Appointment Order, the Receiver respectfully requests that this Court  
4 enter an Order:

- 5 1. Approving the Final Report in its entirety;
- 6 2. Authorizing the payment of the fees and expenses requested in the  
7 Final Fee Applications of the Receiver and his Professionals;
- 8 3. Authorizing and instructing the Receiver to commence termination of  
9 the instant receivership, including certain wind-up tasks, as identified herein;
- 10 4. Staying the above-captioned action and retaining jurisdiction over the  
11 instant receivership solely for the limited purpose of permitting the Receiver to  
12 recover and make the Final Distribution of proceeds recovered from the PPCN  
13 Settlement, if any, pursuant to the Omnibus Distribution Order; and
- 14 5. Discharging and releasing the Receiver and terminating the  
15 receivership upon the Receiver's submission of the Final Declaration and supporting  
16 order to the Court reflecting the completion of all closing tasks, and the final  
17 disposition of the PPCN Settlement and/or judgment including the Final  
18 Distribution, if any.

19  
20 Dated: January 23, 2020

ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP  
DAVID R. ZARO  
JOSHUA A. DEL CASTILLO  
NORMAN M. ASPIS

23 By: /s/ David R. Zaro

24 DAVID R. ZARO  
25 Attorneys for Receiver  
26 THOMAS SEAMAN  
27  
28

**PROOF OF SERVICE**

*Securities and Exchange Commission v. Total Wealth Management, Inc., et al.*  
USDC, Southern District of California – Case No. 15-cv-226 BAS-MSB

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 865 S. Figueroa Street, Suite 2800, Los Angeles, California 90017-2543.

On **January 23, 2020**, I caused to be served on all the parties to this action addressed as stated on the attached service list the document entitled:

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
MOTION OF RECEIVER, THOMAS A. SEAMAN, FOR ORDER:  
(1) APPROVING FINAL REPORT AND ACCOUNTING; (2) AUTHORIZING  
PAYMENT OF FINAL FEE APPLICATIONS OF RECIEVER AND  
PROFESSIONALS; AND (3) STAYING RECEIVERSHIP CASE,  
DISCHARGING AND RELEASING RECEIVER**

- ☐ **OFFICE MAIL:** By placing in sealed envelope(s), which I placed for collection and mailing today following ordinary business practices. I am readily familiar with the firm's practice for collection and processing of correspondence for mailing; such correspondence would be deposited with the U.S. Postal Service on the same day in the ordinary course of business.
- ☐ **OVERNIGHT DELIVERY:** I deposited in a box or other facility regularly maintained by express service carrier, or delivered to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document(s) in sealed envelope(s) or package(s) designed by the express service carrier, addressed as indicated on the attached service list, with fees for overnight delivery paid or provided for.
- ☐ **HAND DELIVERY:** I caused to be hand delivered each such envelope to the office of the addressee as stated on the attached service list.
- ☐ **ELECTRONIC MAIL:** By transmitting the document by electronic mail to the electronic mail address as stated on the attached service list.
- ☒ **E-FILING:** By causing the document to be electronically filed via the Court's CM/ECF system, which effects electronic service on counsel who are registered with the CM/ECF system.
- ☐ **FAX:** By transmitting the document by facsimile transmission. The transmission was reported as complete and without error.

1 I declare that I am employed in the office of a member of the Bar of this Court  
2 at whose direction the service was made. I declare under penalty of perjury under the  
3 laws of the United States of America that the foregoing is true and correct. Executed  
4 on **January 23, 2020** at Los Angeles, California.

5   
6 Martha Diaz  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28